STATE OF MICHIGAN

COURT OF APPEALS

ELMA BOGUS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT BOGUS,

Plaintiff-Appellant,

V

MARK SAWKA, M.D., AND MARK SAWKA, M.D., P.C.,

Defendants-Appellees.

UNPUBLISHED
January 24, 2006

No. 262531
LC No. 03-319085-NH

Before: Cavanagh P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

In this medical malpractice action brought against defendant physician, Mark Sawka, M.D., and his professional corporation, Mark Sawka, M.D., P.C.,[1] plaintiff appeals as of right the trial court's order granting defendants summary disposition. We affirm.

I. Facts and Procedure

On April 13, 2000, plaintiff's decedent, Robert Bogus, sought medical care from defendant physician complaining of knee pain. Based on decedent's blood pressure, decedent was instructed to return for a complete medical exam. Decedent returned on May 5, 2000, at which time his examination included a blood pressure check of 142/80 and cholesterol level measured at 265. Defendant physician did not refer decedent to another physician, prescribe any medications or otherwise order any type of treatment. Decedent returned to defendant physician's office on January 26, 2001, complaining of back pain that radiated to his chest. During this visit, decedent saw a nurse practitioner, Jennifer Boucher, but was not examined by defendant physician. Decedent was prescribed Celebrex and instructed to obtain a back x-ray, which was conducted on January 29, 2001. Plaintiff telephoned defendant corporation on

[1] Defendant physician and defendant corporation are, collectively, referred to hereinafter as "defendants."

February 2, 2001, to obtain the results of the x-ray. Decedent was told the x-ray results were negative, except for arthritis. Decedent died of a heart attack on February 3, 2001.

Plaintiff, decedent's wife, received letters of authority on November 13, 2001. Her complaint and affidavit of meritorious claim were filed June 12, 2003. A physician, Dr. Aris Sophocles, M.D., signed plaintiff's affidavit of merit.

Plaintiff alleged, among other things, that under respondeat superior the defendant corporation was liable for the actions of its employees, here being the defendant physician and the nurse. Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). Defendants claimed that plaintiff's affidavit of merit was deficient because it was signed by a physician, and pursuant to MCL 600.2169(1), Michigan law required that a nurse practitioner attest to the alleged negligence of a nurse practitioner. Defendant further argued plaintiff's claims were time barred due to the deficient affidavit. The trial court agreed with defendants and ultimately dismissed all claims asserted against defendants. This appeal followed.

II. Analysis

On appeal, plaintiff raises two arguments. First she argues the trial court erred in concluding that the affidavit of merit accompanying her complaint had to be executed by a nurse practitioner pursuant to MCL 600.2912a and MCL 600.2169(1). Second, plaintiff argues that even if such a requirement applies in this case, her affidavit of merit is sufficient as to the claims of negligent supervision asserted against the defendant physician. We address each claim separately.

A. Standard of Review

Defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(10). The trial court granted summary disposition for defendants on the ground that plaintiff's affidavits of merit were legally deficient, but the court did not indicate under which sub-rule it granted defendants' motions for summary disposition. This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C). *Burton v Reed City Hosp Corp*, 471 Mich 745, 750; 691 NW2d 424 (2005). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(7) tests whether the claim is barred by, among other things, a statute of limitation. In evaluating motions brought under either of these rules, a trial court considers any affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*., 451 Mich 358; 547 NW2d 314 (1996).

B. May a Claim of Negligence Against a Nurse Practitioner be Supported by an Affidavit of Merit Executed by a Physician?

Under MCL 600.2912d, a complaint alleging medical malpractice must be accompanied by an affidavit of merit. The statute sets forth criteria for the affidavit and requires that the affiant

be an expert qualifying under MCL 600.2169. Plaintiff argues that MCL 600.2169 sets forth the requirements of expert witnesses for claims of physician malpractice only and does not apply to claims of malpractice against nurses. In *Cox v Flint Board of Hosp Mgrs*, 467 Mich 1; 651 NW2d 356 (2002), our Supreme Court held that nurses are neither "practitioners" nor "specialists." Our Supreme Court thus concluded the standards of care for "general practitioners" and "specialists" set forth in MCL 600.2912a apply only to physicians and not to nurses. Plaintiff reasons that because MCL 600.2169 also distinguishes between general practitioners and specialists, it too must be applied exclusively to physicians. Plaintiff therefore concludes the assertions made against the nurse by her physician affiant cannot be found deficient for failing to comply with MCL 600.2169.

We agree with plaintiff that the Supreme Court's interpretation of the terms "specialist' and "practitioner" apply to the extent those same terms are used in MCL 600.2169. In 1993, both MCL 600.2912a and MCL 600.2169 were amended as part of Public Act 1993 PA 78, a comprehensive medical malpractice reform bill. Prior to 1993 PA 78, MCL 600.2169 did not refer to the term "general practitioner." However, MCL Public Act 1993 PA 78 substantially revised MCL 600.2169, including the addition of subsection (c), which expressly sets forth requirements where "the party against whom or on behalf the testimony is offered is a general practitioner . . . ." Our Supreme Court observes the accepted rule of statutory construction that "[W]ords and phrases that have acquired a unique meaning at common law are interpreted as having the same meaning when used in statutes dealing with the same subject." *Pulver v. Dundee Cement Co*., 445 Mich 68, 75; 515 NW2d 728 (1994). As such, this Court must presume that when the Legislature amended MCL 600.2169, it intended the terms "specialist" and "general practitioner" be given the same meaning attached to those terms under MCL 600.2912a. Stated more simply, the terms "general practitioner" and "specialist" used in the expert witness statute, MCL 600.2169, refer to physicians and physicians only.

This being stated, plaintiff's claim nonetheless fails as a matter of law. A medical malpractice action may be maintained against any licensed health care professional, including a nurse. MCL 600.5838a(1)(b). A plaintiff who files a medical malpractice action against a nurse must file with the complaint an affidavit of merit that is "signed by a health care professional who meets the requirements for an expert witness under section 2169." There are three criteria that must be met before an expert is deemed to satisfy section 2169. These criteria are set forth in subsections (a), (b) and (c) of section 2169(1). Because the terms "general practitioner" and "specialist" refer only to physicians, *Cox, supra*, subsections (a) and (c) do not apply in this case. Both of these subsections plainly state that they apply only "[i]f the party against whom or on whose behalf the testimony is offered is a [physician.]" Thus, the affidavit of merit filed with plaintiff's complaint here would be deemed valid only if it comports with subsection (b) of section 2169(1).

Significantly, nothing in section 2169(1)(b) suggests that its application is limited to physicians. To the contrary, section 2169(1)(b) states that it applies to health professionals in general. Pursuant to subsection (b)(i), during the year immediately preceding the date of the alleged malpractice, the affiant/expert must have devoted a majority of his or her professional time to the active clinical practice of the same health profession as the alleged negligent professional. Alternatively, an affiant can qualify as an expert witness if, during that same time frame, he or she taught students at an accredited health professional school and in the same area

of concentration as the alleged negligent professional. MCL 600.2169(1)(b)(ii). Here, however, plaintiff's affiant/expert fails to satisfy the statutory requirements of MCL 600.2169(1)(b). Plaintiff's affiant, a physician, did not devote a majority of his time to nursing. Likewise, plaintiff's affiant was not an instructor of nursing. Accordingly, plaintiff's affidavit of merit is deficient as a matter of law because plaintiff's affiant fails to meet the requirements of MCL 600.2169(1)(b).

C. Is Plaintiff's Affidavit of Merit Sufficient as to the Claims of Negligent Supervision Asserted Against the Defendant Physician?

Plaintiff also argues the trial court erred because plaintiff's affidavit of merit is sufficient as to the claims of negligent supervision asserted against the defendant physician. Defendants maintain the trial court correctly dismissed claims against the defendant physician because the allegations of negligence were based upon the actions of the nurse, and neither plaintiff's statutory notice of intent nor plaintiff's affidavit of merit sufficiently addresses defendant physician's alleged failure to properly supervise the nurse.

We conclude the trial court properly dismissed plaintiff's claims because plaintiff's affidavit of merit was deficient as a matter of law.[2]

Pursuant to MCL 600.2912d(1), an affidavit of merit "shall contain a statement of each of the following:

(a) The applicable standard of practice or care.

(b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.

(c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.

(d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

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[2] We decline to address whether plaintiff's notice of intent was deficient for failing to assert or identify a claim of direct negligence against Dr. Sawka for his alleged failure to supervise nurse Boucher. In *Roberts v Akins*, 470 Mich 679, 700-701; 684 NW2d 711 (2004), our Supreme Court discussed the specificity required in a notice of intent under section MCL 600.2912b(4). The notice of intent at issue in *Roberts* provided no meaningful information. Plaintiff merely stated, in essence, "I went to the doctor and something bad happened." 470 Mich at 697, n 15. The Supreme Court made it very clear that a notice of intent need not delineate every conceivable fact or claim that might ultimately be disclosed through discovery, *Id* at 691-692. "[W]hat is required is [only] that the claimant make a good faith effort to aver the specific standard of care that she is claiming to be applicable to each [defendant] named in the notice." *Id.* We need not determine whether plaintiff satisfied this standard in this case, because plaintiff's affidavit of merit is deficient as to the claim of negligent supervision.

Here, Dr. Aris Sophocles signed plaintiff's affidavit of merit. Dr. Sophocles testified in deposition that Dr. Sawka had an independent duty to review and discuss the decedent's case with the nurse and, had he done so in this case, Dr. Sawka would have or should have timely appreciated decedent's grave condition and acted differently so as to save decedent's life. Dr. Sophocles' testimony is not, though, supported by the affidavit of merit, which makes no mention at all of Dr. Sawka's duty to supervise, review and discuss the decedent's case with nurse Boucher or Dr. Sawka's alleged failure to satisfy that duty.

Paragraph 4 of Dr. Sophocles affidavit of merit mentions the professional corporation's duty as to, among other things, "select, employ, train and monitor its employees," including nurses. The affidavit goes on to conclude that the professional corporation breached the standard of care by failing to take the "actions listed in paragraphs 3 and 4" of Dr. Sophocles' affidavit. This conclusory statement is insufficient to minimally comply with the requirements of MCL 600.2912d(1). See *Roberts v Atkins*, 470 Mich 679; 684 NW2d 711 (2004) (discussing the minimum requirements of a notice of intent). Even if we conclude paragraph 4(a) of Dr. Sophocles' affidavit sufficiently states the standard of care, nothing in the balance of the affidavit of merit indicates how the professional corporation breached that standard. This is particularly troublesome given plaintiff's current theory that it was Dr. Sawka's negligent supervision of nurse Boucher that gave rise to the breach of the standard of care, and nothing alleged by Dr. Sophocles in paragraph 3 of the affidavit of merit supports this theory. Likewise, nothing in the affidavit of merit suggests what the health facility might have done to have complied with the standard of care applicable to health care facilities. In short, plaintiff's affidavit of merit is deficient in that it does not support a theory of direct negligence against Dr. Sawka for the failure to supervise nurse Boucher.

III. Conclusion

Plaintiff's affidavit of merit is deficient as to the actions of the nurse in this case because a physician and not a nurse signed it. Therefore, claims based upon the actions of the nurse were properly dismissed. The affidavit of merit is deficient as to claims of direct negligence against the defendant physician because the affidavit of merit states nothing to support the conclusion that Dr. Sawka breached the standard of care by failing to supervise the nurse practitioner. Therefore, claims of direct negligence asserted against the defendant physician for failing to supervise the nurse practitioner were also properly dismissed.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra